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PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NORTH CAROLINA

In The
SUPREME COURT of the UNITED STATES

TERM 1957

No. 901

MRS. MYRTLE BENNETT, Administratrix of the Estate of A. C. Bennett, deceased,
Plaintiff,

v.

SOUTHERN RAILWAY COMPANY, a corporation,
Defendant.

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Mrs. Myrtle Bennett, Administratrix of the estate of A. C. Bennett, deceased, prays that a writ of certiorari issue to review the decision of the Supreme Court of the State of North Carolina sustaining a Judgment of Nonsuit at the close of the Petitioner's evidence in the Superior Court (the Trial Court) upon the ground that Petitioner's evidence was insufficient to make a case for the jury under the Federal Employers Liability Act, and on appeal the

Supreme Court of North Carolina affirmed the ruling of the lower court.

OPINION BELOW

The opinion of the Supreme Court of the State of North Carolina is reported in a North Carolina Report, Volume 245 at page 261 (as yet in the Advance Sheets only) and in 96 S.E. 2d 31. Said opinion is appended hereto.

JURISDICTION

The opinion and judgment of the Supreme Court of North Carolina which is the subject of this petition was filed and entered on the 11th day of January, 1957.

The jurisdiction of this Court is invoked under 28 U.S. Code, Sec. 1257, sub-section 3, and under the Federal Employers Liability Act, 45 U.S.C. 1952 ed., Sec. 51.

QUESTIONS PRESENTED FOR REVIEW

Did the Supreme Court of North Carolina err in entering its judgment (see appendix) affirming the judgment of the Superior Court of Mecklenburg County, North Carolina (R.p. 22) granting the defendants motion for non-suit at the close of the plaintiff's evidence?

STATED CONVERSELY THE QUESTION IS:

Does the plaintiff's evidence present facts from which fair minded men might draw different inferences as to the alleged negligence of the defendant Railroad proxi-

mately causing the plaintiff intestate's death in exposing him to the hazards of a violent electric storm, resulting in his death when struck by lightning?

In presenting the case to this Court, counsel for the Petitioner are making no point of competency testimony as raised in the Court Below for the reason that the Supreme Court of North Carolina said in its opinion (appendix page 40):

> "However, if it (report of the conductor) were improperly rejected as substantive evidence, such report considered as substantive evidence in connection with all the other evidence in the case would be insufficient to take the case to the jury."

With respect to the competency of certain expert testimony of plaintiff's witness (Mr. Fulcher) the Supreme Court of North Carolina said:

> "The excluded testimony of Mr. Fulcher has been carefully considered and if it were competent in whole which we do not concede, such testimony considered with all the other evidence would not make out a case for the jury."

Wtih respect to the including of certain other testimony the North Carolina Court said:

> "If the excluded testimony of Carl Mayes were competent, it would not strengthen plaintiff's case."

The North Carolina Court ruled certain testimony of the witness Amos Stacy incompetent but petitioner does not

raise any question as to that testimony, and for the purpose of discussing the facts treats the testimony of the above mentioned witnesses as competent since it was considered by the North Carolina Court in passing on the question involved here.

STATUTE INVOLVED

The appeal in this case involved the interpretation and application of 45 U.S.C. Sec. 51 which provides as follows:

> "Every common carrier by railroad while engaging in commerce between any of the several States or Territories, or between any of the States and Territories, or between the District of Columbia and any of the States or Territories, or between the District of Columbia or any of the States or Territories and any foreign nation or nations, shall be liable in damages to any person suffering injury while he is employed by such carrier in such commerce, or, in case of the death of such employee, to his or her personal representative, for the benefit of the surviving widow or husband and children of such employee; and, if none, then of such employee's parents; and, if none, then of the next of kin dependent upon such employee, for such injury or death resulting in whole or in part from the negligence of any of the officers, agents, or employees of such carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves, or other equipment.
>
> Any employee of a carrier, any part of whose duties as such employee shall be the furtherance of interstate

or foreign commerce; or shall, in any way directly or closely and substantially, affect such commerce as above set forth shall, for the purposes of this chapter, be considered as being employed by such carrier in such commerce and shall be considered as entitled to the benefits of this chapter."

STATEMENT

The plaintiff's intestate was killed as the result of being struck by lightning while working as an employee of the defendant, Southern Railway Company, while engaging in interstate commerce on or about the 8th day of July, 1947 near Kings Mountain, North Carolina.

The federal question here involved was first raised by the pleadings in the following manner:

In paragraphs 1, 2, and 3 of her complaint, the plaintiff alleges that the defendant is and, at all times complained of was a duly chartered Virginia corporation, engaged in the business of a common carrier for hire; that A. C. Bennett died intestate in Cleveland County, North Carolina on or about July 8, 1947 and that the plaintiff, Mrs. Myrtle W. Bennett, is the duly qualified and acting representative of his estate (R.p. 2), which allegations are admitted by the defendant in the corresponding paragraphs of its answer. (R.p. 7).

In paragraphs 5, 6, 7, and 11 (R.p. 3 & 4) of her complaint the plaintiff alleges, and the defendant admits by its allegations in the corresponding paragraphs of its answer (R.p. 7 & 8), that on the 8th day of July, 1947, at the time and place of the death of the plaintiff's intestate, the de-

fendant was engaged in interstate commerce, and the plaintiff's intestate was employed by the defendant in interstate commerce and was so engaged, at which time he was killed by lightning, and that at said time and place he was employed and engaged in interstate commerce within the meaning of Title 45, U.S.C.A., Chap. 1, Sec. 51.

By paragraph 12 of the complaint (R.p. 4) the plaintiff alleges that the death of her intestate, A. C. Bennett, was proximately caused by the negligence of the defendant in failing to provide him with a safe place to work, and in negligently and carelessly ordering him to leave a place of safety in a car of the defendant's train, and go out into a fierce and violent electric storm which was then raging, and that his resulting death by lightning was reasonably foreseeable at the time.

The plaintiff further specifically alleges in paragraph 12 of the complaint (R.p. 6) that this cause of action arises under the laws of the United States Title (sic) 54 (should be 45), Chap. 1, Sec. 51 & 59, and that the action was brought within two years after the occurrence as required by the Statute, 45 U.S.C., Section 56.

The allegations of paragraph 12 of the complaint are denied by the defendant in the corresponding paragraph of its answer (R.p. 8).

At the close of the plaintiff's evidence, the defendant's motion for non-suit was allowed and judgment granting said motion and dismissing the action was signed by the Trial Court (R.p. 22). The plaintiff in apt time filed her exceptions and gave notice of appeal to the Supreme Court of North Carolina (R.p. 22 & 23).

The appeal was argued before the North Carolina Supreme Court at the Fall Term, 1956, and the judgment and opinion of that Court affirming the judgment of the Trial Court was duly entered and filed on January 11, 1957 (appendix), which judgment shows that it was based upon a determination of the plaintiff's rights under the Federal Employees Liability Act, 45 U.S.C.A., Sec. 51, and constitutes a holding that the plaintiff's evidence fails, as a matter of law, to make out a question for the jury on the issue of liability of the defendant under the Act.

The plaintiff's evidence tended to show that plaintiff's intestate, A. C. Bennett, was killed by lightning near Kings Mountain, North Carolina on or about July 8, 1947 under the following circumstances:

The deceased, A. C. Bennett, was working as a flagman or brakeman of the defendant's train crew on a freight train operated on that date from Spartanburg, South Carolina to Charlotte, North Carolina, which train stopped about 11:30 or 11:35 A.M. that day just South of the City of Kings Mountain, North Carolina to pick up some cars loaded with stone from a sidetrack running into the Superior Stone Company. At this point the defendant's railway line was doubled tracked and this train came in on the northbound track, both the main line tracks being built on a fill or elevation of a height, varying in the testimony from twelve to thirty feet above the surrounding terrain, and running along near the main track between it and the sidetrack at the place where the plaintiff's intestate was killed, was a pole line carrying telephone or telegraph wires.

When this train arrived at the siding where the accident occurred the whole train was backed into the side track

leading to the Superior Stone Company to allow another freight train which had come up behind it on the northbound track to pass. This train on which the deceased was working was then moved back out on the main track where it was divided, leaving the caboose and a number of boxcars on the northbound main track and the engine with other cars attached pulled back into the side track to pick up the cars loaded with stone.

About this time there came up a violent electric storm with lightning, hail and rain. (R.p. 27). The deceased, Bennett, and Pickard, another of the crew, first got under one of the cars and stayed there until Pickard got wet and they both then came up to the engine and shortly thereafter the deceased, Bennett, went over and got in the caboose of the train which was located on the northbound main line where the conductor, Mr. J. R. Hardin, deceased at the time of the trial, had taken shelter from the storm (R.p. 27). After a while Bennett and the conductor, J. R. Hardin, who was in charge of the train (R.p. 108, Rule 1136), left the caboose and the conductor came over to the engine on the sidetrack and Bennett went south from the caboose along the main track where he was struck by lightning after he had gone about three boxcar lengths (R.p. 29, 30, and 31). When the conductor, Hardin, came over to the engine, he told J. B. Murphree, one of the train crew, that, "We'd make a move then.' 'He meant we'd pull out the loads out of the track and let this northbound go, which was the other train behind us." (R.p. 31). The conductor got out of the cab just a little ahead of the deceased and the deceased, Bennett, followed him. (R.p. 31). Bennett walked south along the main line to check the couplings and the brakes on the loaded cars to be connected and moved (R.p. 31 & 32).

The plaintiff's evidence tended to show further that at the time the deceased was sent out by the conductor there was a severe or violent storm in progress of such severity that the Superior Stone Company plant nearby had been shut down due to the storm (R.p. 85); that the storm at that time was violent and of such severity that the witness, Carl Mayes, "had extreme difficulty using the phone caused by the electric storm—that is the interference over the phone, the lightning running in" (R.p. 86), that it was pouring rain and there was lots of thundering, lightning and hail (R.p. 91 & 93).

That the place where the deceased was sent by the conductor was beside the steel rail of the main line of the railroad (R.p. 32 & 50) at a place where the main line of the railroad was elevated approximately 30 or 40 ft. higher than the highway nearby (R.p. 94); that there were telephone poles with wires on them nearby which were approximately 12 ft. higher than the main line tracks of the railroad (R.p. 89) and that the deceased, A. C. Bennett, was killed by the lightning shortly after he got off of the caboose and started away from the train (R.p. 29).

Hardin, the conductor, Pickard, the flagman, Murphree the brakeman and Ware, the fireman, signed a report contained in the record as plaintiff's "Exhibit K" (R.p. 112) which the plaintiff offered as substantive evidence, since all except Mr. Hardin were adversely examined but the North Carolina Court limited this to corroborative evidence. Excerpts from the same are explanatory of the actions of the deceased in this case and are as follows:

> "And as we were fixing to pull the stone track he was going to take a fusee to pass signals on making some

couplings of cars on the stone track. He came to the cab for a few minutes, and he started walking south by the northbound main line and out on over to the stone track and we were practically even when he was hit. He was going to walk down the main line and then cross over to the stone track. It had been hailing and lightning awfully bad for 10 or 15 minutes. I believe the lightning came out of the air and hit him. When I saw him he was down. I went to the telephone to try to get an ambulance, . . . His right shoe was split and knocked off and his pant's leg split but his clothes otherwise were still on him and not burned."

This evidence the Supreme Court of North Carolina also considered as if it had been competent, without ruling thereon, and although it is a statement of the conductor in writing showing knowledge of the storm and the severity thereof and violence thereof that Court said it would not affect the result of the case even if competent.

H. E. Fulcher, Professor of Physics at Davidson College where he had taught a course dealing with lightning for 31 years and a course in metrology for 11 years, was held by the Court to be an expert witness as a physicist. He testified in substance as follows: Appendix, P. No. 31.

"Lightning coming from the clouds to the ground takes the path of least resistance and the path is shortened for a place that is higher than the surroundings so a higher place increases the hazards there considerably. A steel rail is a conductor of electricity. Such a rail laid on crossties with the crossties having a ballast of stone some 12 inches thick increases the hazards from electricity from a storm in which there is light-

ning. It is common knowledge one should not during an electrical storm be near telephone wires or piles of steel. If a person is out in a storm with lightning, and is on the ground at a point elevated above the ground close by, and steel rails or a railroad are on this elevated place, it is a more hazardous position for a person to be in than in a railroad caboose. Any shield, whether it be metal or wood deflects lightning. The human body is classified as a conductor of electricity. If a person's clothing is wet and he is walking on wet ground, that would increase the conductibility of the human body."

He further testified over the objection of the defendant. which objection was sustained by the Supreme Court of North Carolina in effect, that in his opinion the lightning which killed Bennett could have and did come from the rail of the railroad track (R.p. 73-76); that electricity from a bolt of lightning could jump from one conductor to another for a distance of 12 or 15 feet (R.p. 74-81); that lightning striking a person's shoulder would likely do damage at that point (R.p. 78); that lightning could be transmitted a great distance on the rail of a railroad track (R.p. 78); that the caboose of the train was a safer place than being outside beside the steel rail of the track (R.p. 79-80); that lightning striking the rail would keep to the outside of the caboose, especially when the caboose was wet (R.p. 79-80); that during an electrical storm it is very unwise to be near any conductor (R.p. 81); that lightning could even jump 20 feet from telephone wires to rail or vice versa (R.p. 81). This evidence the North Carolina Court did not concede to be competent but evidently considered on the question of non-suit and reached the conclusion that it with all the other evidence would not make out a case for the jury.

ARGUMENT

I.

FACTUALLY THIS IS A CASE OF FIRST IMPRESSION UNDER THE FEDERAL EMPLOYERS LIABILITY ACT

Counsel for Petitioner have been unable to find any case of deceased having been killed by lightning which was decided by any Court under the Federal Employers Liability Act. Such cases, where deceased is killed by lightning have been found under Workmans Compensation Acts, which are not applicable hereto; injuries and deaths by other conditions of the climate, to-wit: cold, snow, ice, rain etc. (a number of them hereinafter cited) have been considered under the Federal Employers Liability Act and it seems logical that the principles applicable thereto should be made applicable to a case of death by lightning. It is thence considered that the facts of this case present a compelling reason for review of the same by this Court.

II.

AS TO THE SUFFICIENCY OF EVIDENCE REQUIRED TO MAKE A JURY CASE THE FEDERAL RULE APPLIES

The Federal rule clearly is that,

> "Where the facts are in dispute and the evidence in relation to them is that from which fair minded men may draw different inferences the issue of negligence should go to the jury as well as the issue of proximate cause." *Wilkerson* v. *Wilson McCarthy, et al.*, 336 U.S. 53-57, 93 L. Ed. 497.

In the foregoing case this Court discussed at length the rule stated above and other rules applicable to cases tried under the Federal Employers Liability Act.

Whether or not the Supreme Court of North Carolina considered this rule as the test to be applied in the incident case cannot be determined.

This Court reiterated this rule in *Stone* v. *New York, Chicago and St. Louis Railroad,* 344 U.S. 407, 97 L. ed. 441, 73 S. CT 358, which said:

> "We think the case was peculiarly one for the jury. The standard of liability is negligence. The question is what a reasonable and prudent man would have done under the circumstance . . . The likelihood of injury to men pulling or lifting beyond their capacity is obvious . . . to us it appears it would be a debatable issue on which FAIR MINDED MEN WOULD DIFFER" (emphasis ours).

III.

Uniformity of Ruling on This Point is Necessary to Protect the Rights of Litigants Under Federal Employers Liability Act

In view of the failure of the North Carolina Supreme Court in its decision to state the Federal rule applicable on the question of the sufficiency of evidence to make a jury case, and in view of the instant case being one of first impression from a factual standpoint, uniformity of rulings on this question would seem to require this Court to review the incident case.

This Court said in *Beaty* v. *Southern Railway Company*, 320 U.S. 476, 88 L. ed. 239, 64 S. Ct. 232,

> "There is best presented the problem of whether sufficient evidence of negligence is furnished by the record to justify the submission of the case to the jury. In Employers Liability cases, this question must be determined by this Court finally. Through the supremacy clause of the Constitution, Article VI, we are charged with assuring the act's authority in State Courts. Only by uniform Federal rule as to the necessary amount of evidence may litigants under the Federal Act receive similar treatment in all states."

IV.

The Standard of Care Required of the Defendant to Provide the Plaintiff with a Safe Place to Work Must be Commensurate with the Dangers of the Business

In its decision the Supreme Court of North Carolina did not seem to apply the above rule which this Court has applied in many cases including *Wilkerson* v. *Wilson McCarthy, supra,* where this Court said:

> "But the issue of negligence is one for juries to determine according to their findings of whether an employer's conduct measures up to what a reasonable and prudent person would have done under the same circumstances. And a jury should hold the master 'liable for injuries attributable to conditions under his control when they are not such as a reasonable man ought to maintain in the circumstances, 'bearing in

mind that' the standard of care must be commensurate to the dangers of the business."

This is the rule and this would require a higher degree of care on the part the employer as the danger of the circumstances increased. The decision of the North Carolina Court seems to state that employees of a railroad company under the Federal Employers Liability Act must accept many dangers, particularly from the elements, for the Court said in its decision:

> "The duties of the operating crew of a freight train require them to expose themselves off the train and on the tracks in all sorts of inclement weather, in pouring rain, in storms with lightning, in hail, sleet and snow, in freezing cold and torrid heat".

It would seem that the above stated standard of care would require some effort on the part of an employer to relieve his employee of danger arising from those matters mentioned by the North Carolina Court immediately above. We do not believe that under this rule an employer can totally disregard the safety, welfare and health of his employees simply because the danger to them arises from the elements or inclement weather. To so hold would dispense with any degree of care on the part of the employer under the circumstances mentioned.

In fact we believe that this Court has taken a different viewpoint in a number of cases recently decided by it and to support that belief we cite the following cases.

Sculz v. *Pennsylvania Railroad Company,* 350 U.S. 523, 100 L. ed 668, 76 S. Ct. 608. This was an action brought

for the death of the deceased while working on tugboats docked at the pier. While the action was under the Jones Act, the said act makes applicable the provisions of Federal Employers Liability Act to those doing such work. This Court took into consideration, the condition of the weather, the fact that the decks of various boats were covered with ice, and other matters relating to the climate, to determine whether there was sufficient evidence to make a jury case, and even though no one witnessed what happened to Sculz and his body was later found in the water, this Court said:

> "It must be borne in mind that negligence cannot be established by direct, precise evidence, such as can be used to show that a piece of ground is or is not an acre . . . but measuring negligence is different. The definitions of negligence are not definitions at all, strictly speaking . . . issues of negligence therefore call for the exercise of common sense and sound judgment under the circumstances of particular cases. We think these are questions for the jury to determine. We see no reason, so long as the jury system is the law of the land, and the jury is made the tribunal to decide disputed questions of fact, why it should not decide such questions as these as well as others."

In *Anderson* v. *Atchinson, T & SFR Company,* 333 U.S. 821, 92 L. ed. 1108, decedent, a conductor of a passenger train, fell from the train's rear vestibule where it was necessary for him to be in order to properly perform the duty in which he was then engaged. He was so injured that he could not secure help. He was missed when the train stopped at the next station but the train crew went on for some distance without trying to ascertain his whereabouts. He was ultimately found lying alongside the track near where he

had fallen and a few days later died of exposure due to the very cold weather from which he had suffered.

This Court held that the Petition in that case stated a cause of action for wrongful death and indicated that a jury could find the decedent's exposure and consequent death were due in whole or in part to failure of respondent's agents to do what a reasonable and prudent person would ordinarily have done under the circumstances of the situation.

In *Pullman Company* v. *Montimore,* 17 F. 2d 2, plaintiff, a pullman porter, was left with a defective car in a blizzard without heat. and was not relieved for an unreasonable period of time. He contracted pneumonia and the Circuit Court held that he had a jury case for damages under the Federal Employers Liability Act. This Court denied ceritorari in 71 L. ed. 1328, 274 U.S. 746; 47 Sup. Ct. Rep. 659.

Also in the two following cases the Circuit Courts of Appeals have had occasion to consider climatic conditions in connection with other facts tending to show negligence on the part of the defendant.

In *Renaldi, Admx.* v. *New York, New H. and H. R. Company,* 230 F. 2d 841, plaintiff was allowed to recover where his decedent was in the employ of the defendant performing maintenance work on defendant's anchor bridges which are overhead steel structures carrying high voltage electrical current furnishing the motive power for defendant's trains. Deceased was painting and came in contact with the live part of two circuit breakers which caused two flash explosions and caused him to fall about 30 feet to the ground and to die several days later.

There the Court upheld the verdict for the plaintiff and said:

> "If there is evidence from which reasonable men could conclude that Renaldi's injuries were caused wholly or partially by negligence on part of the defendant, the verdict must be sustained. . . . IN THIS CASE THERE WAS EVIDENCE FROM WHICH THE JURY COULD CONCLUDE THAT THE WEATHER WAS WET AND STORMY." (emphasis ours).

Hamelin, Renaldi's foreman, had decided that the work should continue, and that only a portion of the wires needed to be de-energized. Under such circumstances the jury reasonably could have concluded that the defendant had been negligent in failing to provide Renaldi with a safe place to work. Equally fair minded men might come to a different conclusion, but "only when there is a complete absence of positive facts to support the conclusion reached does a reversible error appear."

Also in *Anderson* v. *Railway Company*, 227 F. 2d 91, plaintiff, a switchman, brought action under the Federal Employers Liability Act for injuries sustained in a fall on ice in the railroad yards when he stepped off the engine to throw a switch and fell upon the ice. There were 210 miles of railway track and more than 1600 switches, the largest industrial yard on the railway. Freezing rain and sleet followed by snow began to fall the day before about 11:00 P.M. and formed a glaze of ice. The storm continued during the remainder of the night and until the morning of the day of the accident.

The Court ruled favorably on the sufficiency of plaintiff's evidence to make a jury case and quoted this Court as follows from *Bailey* v. *Central Vermont Railway, Inc.*

> "It is part and parcel of the remedy afforded railroad workers under the Employers Liability Act. Reasonable care and cause and effect are as elusive here as in other fields. But the jury has been chosen as the appropriate tribunal to apply these standards to the facts of these personal injuries . . . to deprive these workers of the benefit of a jury trial in close or doubtful cases is to take away a goodly portion of the relief which Congress has afforded them. 319 U.S. 350, 63 S. Ct. 1062, at page 1064, 87 L. Ed. 1444.

V.

Was the Danger of Plaintiff's Intestate Being Struck by Lightning During a Violent Electric Storm too Remote for Defendant's Conductor to Anticipate

The Supreme Court of North Carolina said in its opinion:

> "Where lightning will strike to use a Mohammedan phrase, only God knows."

Petitioner contends that while Mohammed's statement may be true it has no application to the facts of this case, but that in order to constitute negligence on the part of the defendant it is not necessary for the defendant or its conductor to know where lightning will strike. The pertinent question is where is it *likely* to strike. Petitioner concedes that the Creator established one sure law with respect to the

behavior of this terrific force known as lightning which is also static electricity. That law is that it will seek the easiest and nearest pathway between cloud and cloud or between the heavens and the earth, that is the one offering the least resistance to its passage.

This law has long been known to scientists and layman alike, and it and some of the laws respecting the behavio. of lightning which necessarily spring from it, have been almost instinctively realized and understood by the mass of people from experience with lightning.

There are certain corollaries logically following from the primary law above stated.

(A) The first is that when the storm cloud approaches with flashing lightning and crashing thunder, shelter is desirable. It has been the custom of mothers and fathers to call their children from their play into the home or other available shelter when such a cloud approaches even though there is no rain, hail, wind or other element to advise of the necessity of taking shelter. The very fact that the train crew including the conductor had once taken shelter from this particular storm would of itself seem to show that the conductor realized the danger from electricity and that shelter was advisable, and certainly in the face of this fact, fair minded men could differ as to the reasons for the conductor permitting the train crew to take shelter and then to send them back out into a severe and violent electric storm.

(B) The next corollary is that an elevated place shortens the pathway of lightning in its travel from the heavens to the earth. Any mature person could reasonably be expected to know that tall trees, telephone poles, telegraph poles, tall

buildings, buildings on a high hill and other elevated places have been struck more frequently than other places at a low elevation.

(C) The next corollary is that metals are good conductors of electricity and lightning is likely to travel along them, and this is well known to mature men. In fact in *Starr* v. *Telephone Company,* 156 N.C. 435, 72 S.E. 484, the Supreme Court of North Carolina sustained the charge to the jury of the Trial Court where it took judicial knowledge of the following facts:

> "Then as I said there are some well known facts that may be considered in the same way as if it had been testified to. It is a well known fact for instance that lightning in time of a storm is frequently discharged from the clouds and passed to the earth, and the metal wires in the air are good conductors of electricity much better than air and that electricity discharged from the clouds near such wires is liable and apt to pass on them and along them to the earth, and that if a human body which is also a good conductor is in contact with a wire charged with electricity it will pass through it to the ground, or if it is near it if the charge is strong enough, it is likely to seek it and pass to the ground, the human body being a better conductor than the air."

These principles, well known by humanity, and judicial notice having been taken of them by the North Carolina Court, and expert opinion evidence having been given of them by the Petitioner, should certainly raise the question as to whether or not fair minded men would differ as to whether or not there was danger or negligence on the part

of the conductor of this train in sending the deceased back out into a violent storm.

The Petitioner believes that the argument put forth above for the submission to the jury of this case upon the facts are supported by logic, and also by evidence, and also by law of cases decided under the Federal Employers Liability Act together with well known principles of law decided by the Courts. In fact Petitioner believes that the North Carolina Supreme Court's decision in this case varies from a previous somewhat parallel decision by it under the Federal Employers Liability Act, as well as with the manner in which this Court would have decided this case.

The case referred to is *Ridge* v. *N.S.R. Company*, 167 N.C. 511, 83 SE 762, where an employee of the railroad was upon the walkway on the top of one of the boxcars of the train in the course of his employment and the walkway and the top of the boxcar along with the plaintiff either fell or was blown off to the ground. There was conflict in the evidence as to the strength of the wind blowing at the time of the plaintiff's injury.

In that case the Court said:

> "There are only two possible explanations for this injury, to-wit: (1) that the roof was defective causing it under the impact of an ordinary wind, to be thrown against the plaintiff, thereby knocking him off the car, and (2) that a whirlwind of extraordinary violence blew the top off the car and carried the plaintiff along with it. The plaintiff was entitled to recover in any event".

The Court then said in substance that if the roof was defective it should have been discovered by inspection, and if it was not defective plaintiff was still entitled to have a jury consider the case, it could not successfully rely upon the wind as an act of God because the storm was in progress when the conductor ordered the plaintiff out into it, "and it was actionable negligence to give such an order under these circumstances".

Petitioner respectfully submits that the principle applicable to the fact that an act of God was involved in this case was well stated, but not followed, by the North Carolina Court in its Appended Decision as follows:

> "One who is under a duty to protect others against injury cannot escape liability for injury of such others on the grounds that it was caused by an act of God unless an natural phenomenon which caused the injury was so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against, and it is not sufficient that such phenomena are unusual or of rare occurence." 65 CJS, Negligence, p. 433.

Petitioner also respectfully submits that on the question of remoteness or foreseeability, that the following is a clear statement of the principale of law applicable and that the decisions of this Court, and other Federal Courts, under the Federal Employers Liability Act are illustrations thereof.

> "Foreseeable means that if a person of ordinary prudence would have foreseen that such an injury as occurred *might and probably would result from the act of negligence,* such negligence is the proximate cause

of the injury, and does not mean that the negligent party ought reasonably to have foreseen particular consequence or precise form of injury, or particular manner of occurrence, or that it would occur to a particular person." Browning v. Beck, 73 SW 2d 626, 628 (Texas Civil Appeals) affirmed 1015 W. 2d 545.

This court held in *Lillie* v. *Thompson*, 324 U.S. 459, 92 L. ed. 73, where plaintiff sued for damages under Federal Employers Liability Act for injuries received by criminal assault where she, a 22 year old woman, worked alone, from 11:30 P.M. to 7:30 A.M. in a one-room frame building situated in an isolated part of respondent's railroad yards in Memphis where no provision had been made to protect her from such assault and where respondent had reason to know that the yards were frequented by dangerous characters.

This Court said:

"We are of the opinion that the allegations in Complaint if supported by evidence will warrant submission to a jury . . . that the foreseeable danger was from intentional or criminal misconduct is irrelevant; respondent nevertheless had the duty to make reasonable provision against it. Breach of that duty would be negligence . . . and ve cannot say as a matter of law that Petitioner's injury did not result at least in part from such negligence."

This Court in *Cahill* v. *Railway Company*, 224 F. 2d 627, 236 F. 2d 410, where plaintiff, a brakeman, standing behind a train stopped in a highway traffic lane, was struck

by a truck which stopped for the train and started up suddenly and struck the injured plaintiff, reversed the Circuit Court of Appeals which had previously reversed a verdict for the plaintiff in the District Court, on the ground that plaintiff's injury was too remote to be anticipated or foreseen. The Circuit Court of Appeals was reversed by this Court by memorandum opinion in 76 S. Ct. 180, 350 U.S. 898, 100 L. ed. 790, holding that plaintiff had a jury case. Re-hearing was denied by this Court in 350 U.S. 943, 100 L. ed. 823, 76 S. Ct. 300.

Foreseeability was also directly involved, and decided in favor of the plaintiff, in the following Federal Court cases.

In *Cereste* v. *New York, N.H. and H. R. Company,* 231 F. 2d 50, CERT. denied 76 S. Ct. 848, the plaintiff sued for injuries under the act by reason of having tripped over a lump of coal in the pathway between parallel tracks and thereby coming in contact with a moving freight train. The verdict for plaintiff was affirmed in the Circuit Court of Appeals.

Also in *New York, N. H. and H. R. Railway Company* v. *Leary,* 204 F. 2d 461-7, where conductor got off the train in the dark to fix the air hose on brakes and fell off of a trestle bridge where the train had stopped, which bridge had no sides on it to protect against a fall. The jury could say that such injury was foreseeable.

CONCLUSION

For the foregoing reasons it is respectfully submitted that this Petition for a Writ of Certiorari should be granted.

GUY CARSWELL
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Charlotte, North Carolina
and
WILLIAM H. ABERNATHY
Law Building
Charlotte, North Carolina
and
JAMES F. JUSTICE
Law Building
Charlotte, North Carolina
Counsel for Petitioner

Service of the Attached and Foregoing Petition for Writ of Certiorari is Hereby Accepted and Receipt of a Copy is Hereby Acknowledged. This 2nd Day of April, 1957.

BY: HEWSON

ROBINSON, JONES & HEWSON
Attorneys for Defendant

March, 1957

APPENDIX

SUPREME COURT OF NORTH CAROLINA
FALL TERM 1956

MRS. MYRTLE W. BENNETT, Administratrix
of the Estate of A. C. BENNETT, Deceased,

v.

SOUTHERN RAILWAY COMPANY,
A corporation

No. 248—Mecklenburg

Appeal by plaintiff from Campbell, J., March Civil Term 1956 of Mecklenburg.

Civil action for damages for alleged wrongful death of A. C. Bennett on 8 July 1947 instituted on 6 July 1948, under the provisions of the Federal Employers' Liability Act, by his widow as administratrix of his estate, for the benefit of herself and his dependent child.

On 8 July 1947 defendant operated a double-track railroad from Charlotte, North Carolina, to Spartanburg, South Carolina, which passed through Kings Mountain, North Carolina. Just south of Kings Mountain there was situate a plant of Superior Stone Company, and at or near this plant was a sidetrack or siding with two tracks serving the plant. About 11:30 a.m. on this day a freight train of

defendant in transit from Spartanburg, South Carolina, to Charlotte, North Carolina, backed into this siding to clear the main line for a first class freight train to pass, preparatory to picking up some cars there loaded with stone. Plaintiff's intestate A. C. Bennett was a member of the train crew as a brakeman. Defendant admitted in its answer that at the time and place plaintiff's intestate was engaged in interstate commerce.

When the first class freight train had passed, the freight train came out of the siding, and the rear end of the freight train and the caboose were set out on the north bound main track. On the siding were some empty cars ahead of cars loaded with stone, which loaded cars were to be attached to the train for movement to another destination. The engine with some boxcars went into the siding to switch the empty cars, and get the loaded cars to connect with the train. While this work was going on, a severe storm with thunder, lightning, hail and rain came up in the vicinity, and the work was stopped.

J. R. Hardin, the conductor, who was dead at the time of the trial, was in charge of the train crew. While the work was stopped, F. W. Pickard, the flagman, and A. C. Bennett stayed for a time under a car. Pickard got wet, and both went and got in the cab of the engine. In a few minutes Bennett said: "I am going over to the cab," and went to the caboose on the north bound main track. A witness testified Bennett said he was going to the caboose for a raincoat. When he arrived, he and the conductor were in the caboose, and the rest of the train crew were in the cab of the engine.

J. B. Murphree, a brakeman on the train, on his adverse

examination by plaintiff, testified in substance as follows: He saw J. R. Hardin, the conductor, get out of the caboose ahead of A. C. Bennett. Hardin came to the cab of the engine where the other members of the train crew were, and Bennett went another way. Hardin said, "we'd make a move, and pull the loads out, and we'd clear the main line, and let the north bound go, we'd get those loaded cars." Bennett's duties in connection with moving this train were about the same as his: checking the couplings and brakes on the loaded cars to be connected and moved. Murphree went in the same direction Bennett was going, only he was on the sidetrack and Bennett was on the main line. Murphree testified: "The storm had slacked up when we all went to work there." He did not see Bennett struck, but there was a bolt of lightning and thunder, and he saw Bennett down and lying east of the north bound main line, with a fusee in his hand. He had heard no conversation between Hardin and Bennett immediately prior to Bennett's being struck.

M. G. Gordon, the engineer, who was adversely examined by plaintiff, testified the lightning and thunder had slackened up, when he saw Bennett down on the ground.

F. W. Pickard, the flagman, who was adversely examined by plaintiff testified on cross-examination: "The storm had slackened up when this thing happened; it had stopped . . . The lightning that struck Mr. Bennett was not the last lightning that occurred. It had been raining and thundering and lightning, I'd say, about 15 minutes prior to the time he was struck." Pickard testified he could not say that Bennett received an order from the conductor.

S. H. Ware, the fireman, upon his adverse examination

by plaintiff, testified he saw Bennett falling, and his fall was preceded by a loud crash of thunder, but he does not remember any flash of lightning. He further testified that when the conductor got out of the caboose and started to the engine, Bennett started walking to the cars to be loaded. He also testified, "this storm had slackened up when this thing occurred."

Robert Dawkins, a witness for plaintiff, testified he was hauling gravel to be loaded in boxcars. A storm came up while they were loading, and the belt was cut off. There was a path on the east side of the main line where Bennett was walking, a little bit down below the end of the cross ties, and the ground sloped from the end of the cross ties down to the path. When he first saw his body, his feet were in the path and the upper half of the body was lying up on the rock bed near the cross ties. It was raining hard, and Bennett's clothing was "wringing wet." It was thundering and lightning all around, sort of like it was striking close by.

Carl Mayes testified for plaintiff he was superintendent for Superior Stone Company. That the storm this day was severe or violent, and they had closed down their operations at the plant, due to the storm.

John Setzer, a witness for plaintiff, testified that at the time Bennett was put in a car to go to a doctor, it was pouring rain, and there was a lot of thundering, lightning and hail.

Amos Stacy testified as a witness for plaintiff that it was raining, thundering and lightning when Bennett was killed.

Plaintiff alleged in her complaint that her intestate was killed either by an explosion of a fusee or by lightning, and the defendant in its answer admitted that he was killed by lightning.

H. E. Fulcher, Professor of Physics at Davidson College, where he had taught a course dealing with lightning for 31 years and a course in meteorology for 11 years, was held by the court to be an expert witness as a physicist. Immediately prior to such holding by the court, the court asked Mr. Fulcher this question: "Do you consider yourself as a physicist or an expert in lightning?" He replied: "No, sir, I'm a physicist." Mr. Fulcher testified in substance as follows: Lightning coming from the clouds to the ground takes the path of least resistance, and the path is shortened for a place that is higher than the surroundings, so a higher place increases the hazards there considerably. A steel rail is a conductor of electricity. Such a rail laid on cross ties with the cross ties having a ballast of stone some 12 inches thick increases the hazards from electricity from a storm in which there is lightning. It is common knowledge one should not during an electrical storm be near telephone wires or piles of steel. If a person is out in a storm with lightning, and is on the ground at a point elevated above the ground close by, and steel rails of a railroad are on this elevated place, it is a more hazardous position for a person to be in than in a railroad caboose. Any shield, whether it be metal or wood, deflects lightning. The human body is classified as a conductor of electricity. If a person's clothing is wet and he is walking on wet ground, that would increase the conductibility of the human body. A ballast of stone is a poor conductor. All rock is a good insulator. A stone ballast under a rail would have a tendency to keep electricity in a rail from getting from the rail to the ground.

No burnt marks were seen on Bennett's body. His right trousers' leg was torn a bit on the bottom, and scorched, his raincoat was split, a shoe was knocked off, and the sock on the foot with the shoe off was scorched.

S. H. Ware testified he saw Bennett fall to the ground, and the fill on which he fell was about 12 to 15 feet above the natural ground around. There was other evidence the fill was 16 to 18 feet above the ground.

There was a line of telephone poles running along the railroad track, and between the sidetrack and main line. The poles were 22 to 25 feet high. The poles between the sidetrack and main line were in a ravine, and there was not much difference in the elevation between the height of the top of the railroad track and the wires on the poles.

From a judgment of nonsuit entered at the close of plaintiff's case, upon motion of the defendant, plaintiff appeals.

WILLIAM H. ABERNATHY, GUY T. CARSWELL and JAMES F. JUSTICE for Plaintiff, Appellant.

W. T. JOYNER and ROBINSON, JONES & HEWSON for Defendant, Appellee.

Parker, J. The Federal Employers' Liability Act, as set forth in U. S. C. A. Vol. 45, sec. 51, provides that every common carrier by railroad, while engaged in interstate or foreign commerce, shall be liable in damages, in case of the death of one of its employees, to his or her personal representative, for the benefit of certain enumerated persons, for such death "resulting in whole or in part from the negligence of any of the officers, agents, or employees of such

carrier, or by reason of any defect or insufficiency, due to its negligence, in its cars, engines, appliances, machinery, track, roadbed, works, boats, wharves or other equipment."

By the explicit words of the Act the basis of liability of the carrier is negligence, however much Judges may disagree as to what facts are necessary to constitute negligence. Although the decisions under the Act are most liberal in allowing employees to recover, it has been held time and again that the Act does not make the carrier an absolute insurer against personal injuries or death suffered by its employees, and that recovery lies solely upon the concurrence of negligence on the part of the carrier and injury or death as cause and effect. *Wilkerson* v. *McCarthy,* 336 U. S. 53, 93 L. Ed. 497; *Tiller* v. *A. C. L. R. Co.,* 318 U. S. 54, 87 L. Ed. 610.

The 1939 amendment to this Act released the employee from the burden of assumption of risk by whatever name it was called. *Tiller* v. *A. C. L. R. Co., Supra.*

The Act, as set forth in U. S. C. A. Vol. 45, sec. 53, provides that contributory negligence shall not bar a recovery of damages by an injured employee, or by his personal representative where such injuries have resulted in death.

In *Bailey* v. *Central Vermont R. Co.,* 319 U. S. 350, 87 L. Ed. 1444, the Court said: "The rights which the Act creates are federal rights protected by federal rather than local rules of law." See Anno. U. S. Supreme Court Reports, 96 L. Ed. 408, *et seq.*

Plaintiff's intestate was killed by lightning. Lightning, or a bolt or stroke of lightning, occurring in the atmos-

phere during storms is an act of God. *Gleeson* v. *Virginia Midland Railway Co.*, 140 U. S. 435, 35 L. Ed. 458, 462; *Sauer* v. *Rural Co-op. Power Assn. of Maple Lake*, 225 Minn. 356, 31 N. W. 2d 15; Words and Phrases, Permanent Ed., Vol. 2, Act of God, pp. 287-288, Lightning.

In *Ferebee* v. *R. R.*, 163 N. C. 351, 79 S. E. 685, Hoke, J., writing for the Court said, quoting from Shearman and Redfield on the law of negligence, 6th Ed., sec. 16 b: " 'The rule is the same when an act of God or an accident combines or concurs with the negligence of the defendant to produce the injury, or when any other efficient cause so combines or concurs; the defendant is liable if the injury would not have resulted but for his own negligent act or omission.' " See also: *Ridge* v. *R. R.*, 167 N. C. 510, 83 S. E. 762; *Comrs.* v. *Jennings*, 181 N. C. 393, 107 S. E. 312; *Lawrence* v. *Yadkin River Power Co.*, 190 N. C. 664, 130 S. E. 735.

In *Kindell* v. *Franklin Sugar Ref. Co.*, 286 Pa. 359, 363, 133 A. 566, 568, the Supreme Court of Pennsylvania tersely said: "He whose negligence joins with the act of God in producing injury is liable therefor."

Legal responsibility for negligence joined with an act of God depends upon the fact that the negligence operated as an efficient and contributing cause of injury. Otherwise, the case will fall within the rule that no action lies for an injury attributable to an unavoidable accident. "One who is under a duty to protect others against injury cannot escape liability for injury of such others on the ground that it was caused by an act of God unless the natural phenomenon which caused the injury was so far outside the range of human experience that ordinary care did not require that it should be anticipated or provided against, and

it is not sufficient that such phenomena are unusual or of rare occurrence." 65 C. J. S., Negligence, p. 433.

In *Brady* v. *Southern R. Co.*, 320 U. S. 476, 88 L. Ed. 239, the Court said: "The weight of the evidence under the Employers' Liability Act must be more than a scintilla before the case may be properly left to the discretion of the trier of fact—in this case the jury. Citing authority. When the evidence is such that without weighing the credibility of the witnesses there can be but one reasonable conclusion as to the verdict, the court should determine the proceeding by nonsuit, directed verdict or otherwise in accordance with the applicable practice without submission to the jury, or by judgment notwithstanding the verdict."

In *Tennant* v. *Peoria & Pekin Union R. Co.*, 321 U. S. 29, 88 L. Ed. 520, it is said: "In order to recover under the Federal Employers' Liability Act, it was incumbent upon petitioner to prove that respondent was negligent and that such negligence was the proximate cause in whole or in part of the fatal accident. Citing authorities. Petitioner was required to present probative facts from which the negligence and the causal relation could reasonably be inferred. 'The essential requirement is that mere speculation be not allowed to do duty for probative facts, after making due allowance for all reasonably possible inferences favoring the party whose cause is attacked.' " Citing authorities.

In *A. C. L. R. Co.* v. *Craven*, 185 F. 2d 176, *Certiorari* denied, 340 U. S. 952, 95 L. Ed. 686, the Court said: "Dangers are implicit in such occupations as railroading, and railroads are not insurers of their employees."

The precise question we have for decision is this: Considering the plaintiff's evidence as true and in the light

most favorable to her, and giving to her all reasonably possible inferences to be drawn therefrom, has she produced evidence that the defendant was negligent, and that such negligence joined with an act of God was the proximate cause in whole or in part of the death of plaintiff's intestate? If so, her case should have been submitted to the jury. If not, the judgment of nonsuit below is correct. A motion for a compulsory nonsuit under G. S. 1-183 is the proper procedure to test the legal sufficiency of the evidence to carry the case to the jury.

Plaintiff does not contend that her intestate's death was caused by reason of any defect or insufficiency, due to defendant's negligence, in its cars, engines, appliances, machinery, track, roadbed, works or other equipment. Plaintiff's contention is that defendant negligently failed to exercise ordinary care to provide her intestate a reasonably safe place to work by requiring him during a severe storm accompanied with lightning to leave the caboose and to go out on the tracks to couple boxcars.

At common law the duty of the employer to use reasonable care in furnishing his employees with a safe place to work was plain. Such rule is deeply embedded in federal jurisprudence, and applies to the Federal Employers' Liability Act. *Bailey* v. *Central Vermont R. Co., supra.* In *Patton* v. *Texas & P. R. Co.,* 179 U. S. 658, 45 L. Ed. 361, 365, the Court said: ". . . there is no guaranty by the employer that place and machinery shall be absolutely safe . . . Reasonable care becomes, then, a demand of higher supremacy; and yet, in all cases it is a question of the reasonableness of the care; reasonableness depending upon the danger attending the place or the machinery." The last sentence was quoted in *Bailey* v. *Central Vermont R. Co., supra.* In other

words, the standard of care must be commensurate to the danger of the business.

Under the defendant's Book of Operating Rules, the conductor J. R. Hardin had charge of the train and all employees thereon, and he was responsible for the performance of their duties by the train employees. The duties of the operating crew of a freight train require them to expose themselves off the train and on the tracks in all sorts of inclement weather, in pouring rain, in storms with lightning, in hail, sleet and snow, in freezing cold and torrid heat. The conductor and plaintiff's intestate left the caboose together, while, taking the evidence in the light most favorable to plaintiff, it was still pouring rain, thundering and lightning. However, it is significant that there is no evidence that the lightning of the storm struck any person or object, with the exception of the tragic death of plaintiff's intestate, and further that while the storm was going on plaintiff's intestate left the engine on the sidetrack, and walked through the storm to the caboose on the main track to get his raincoat. The conductor walked to the engine on the sidetrack, where the other members of the train crew were, and said, "we'd make a move, and pull the loads out." The conductor was dead when the trial took place. There is no evidence as to what he said to plaintiff's intestate about leaving the caboose. But it would seem to be a fair inference from the evidence that he told plaintiff's intestate, "we'd make a move and pull the loads out," or spoke words of similar meaning, and that plaintiff's intestate considered it an order he was bound to obey, and went on the tracks to perform his duty as a flagman in coupling the loaded cars on the sidetrack. There is no evidence that defendant was the owner or had anything to do with the telephone poles and wires near its track at the site. It is common

knowledge that telephone and telegraph poles and lines are frequently run parallel with railway tracks.

The narrow question we have is whether the conductor telling or ordering plaintiff's intestate to get out of the caboose and go outside to perform his duties was negligence, that is a failure to exercise reasonable care depending upon the danger attending the place and time. Where lightning will strike, to use a Mohammedan phrase, only God knows. The Texas Court of Civil Appeals said in *Western Telephone Corp.* v. *McCann*, 69 S. W. 2d 465:

> "It may be technically true, as appellant and its experts contend, that the phenomena of lightning is 'highly complex,' rather than 'freakish.' As a practical matter, the uncertainties inherent in a bolt of lightning may not be encompassed in either or both of those terms, or in any term of any known language. It is known, only, that it is all-powerful, all-embracing, inconsistent, inscrutable, searching, terrifying, beautiful, deadly. It is no respector of persons, places, or occasions."

A railroad must operate its trains through fair weather and foul, and cannot stop all switching operations until all electrical storms are over, if it is efficiently to operate its business. The test is whether reasonable men, examining the circumstances there and then and the likelihood of injury from lightning, would have ordered the train crew and plaintiff's intestate to make a move and pull the loaded cars out. In our opinion, after considering all the evidence in the light most favorable to plaintiff, and accepting it as true, and giving her the benefit of all reasonable inferences to be drawn therefrom, the only reasonable conclusion at

which fair-minded men could arrive is that the danger at the time and place of being struck by lightning was so remote as to be beyond the requirement of due care, and, therefore, the death of plaintiff's intestate was not caused in whole or in part by any negligence on defendant's part. Bare possibility is not sufficient. *Milwaukee & St. P. Ry. Co.* v. *Kellogg,* 94 U. S. 469, 24 L. Ed. 256. "Events too remote to require reasonable provision need not be anticipated." *Brady* v. *Southern R. Co., supra.* To hold otherwise would be to make defendant an insurer.

In *Fort Worth & Denver City Ry. Co.* v. *Smith,* 206 F. 2d 667, the Court said: "It is a general rule that a railway company is not liable to its employees for injuries resulting from climatic conditions, such as ice and snow; but within its yard limits it must exercise a degree of care commensurate with the risks to prevent the accumulation of snow and ice in such quantity, form, and location as to be a menace to the safety of its employees working in its yards."

Amos Stacy, a witness for plaintiff, testified that on the day Bennett was killed, he was down in a pit at the crusher of the Superior Stone Company plant. That the plant was not in operation for sometime before lunch on account of the storm, lightning, thunder and rain. He was asked by plaintiff's counsel to what extent it was thundering and lightning at the place where Bennett was killed, when he arrived there. He answered: "It was still thundering and lightning. It was too bad to be out insofar as walking and doing anything was concerned. The plant had not been operating for the last hour or so on account of the rain." Defendant's counsel made a motion "to strike out the statement that the conditions were too bad." The court allowed

the motion, and plaintiff excepted, and assigns this as error. The evidence was properly excluded.

In *Parks* v. *Sanford & Brooks, Inc.,* 196 N. C. 36, 144 S. E. 364, it was held that whether or not the place at which plaintiff's intestate was at work was unsafe is a question for the jury, and the opinion of witnesses with respect to this matter was not competent, and was properly excluded as evidence. In *Wilson* v. *Lumber Co.,* 186 N. C. 56, 118 S. E. 797, testimony of non-experts that the wire cable furnished was unsuitable and improper for the work was held erroneously admitted in evidence. In *Marshall* v. *Telephone Co.,* 181 N. C. 292, 106 S. E. 818, the opinion of a witness that the place was not safe was improperly admitted and constituted reversible error. See also: *Marks* v. *Cotton Mills,* 135 N. C. 287, 47 S. E. 432; *Phifer* v. *R. R.,* 122 N. C. 940, 29 S. E. 578.

Plaintiff assigns as error the exclusion as substantive evidence of the report of the conductor, which was signed by other members of the train crew, to the defendant as to plaintiff's intestate's death. The court permitted the plaintiff to read this report to the jury for the purpose of corroborating the testimony of S. H. Ware, the fireman. Such report is to a large extent similar to evidence admitted without objection, and the reasonable inferences to be drawn therefrom. However, if it were improperly rejected as substantive evidence, such report considered as substantive evidence in connection with all the other evidence in the case would be insufficient to take the case to the jury.

Plaintiff also assigns as error the refusal of the court to permit the witness H. E. Fulcher to answer certain hypothetical questions and other questions. This is in substance

the answer of Mr. Fulcher to one hypothetical question: My opinion is that lightning from the rail killed Mr. Bennett. As he walked south, his right foot was nearest the rail. Now, no evidence has been brought out that he was walking on the end of the cross ties, but that is the way railroad men walk. I have been with them, and have seen them. They walk on the end of the cross ties. They don't walk off, unless there is a good path. I have gone over there and measured these cross ties, and if he was walking normally on the end of the cross ties, his right foot was anywhere from 4 to 6 inches away from the rail. His right shoe was torn, his sock charred. This is the substance of other testimony of Mr. Fulcher, which was excluded: Electricity from a bolt of lightning can jump from one conductor to another for 12 or 15 feet. My opinion is that the lightning that killed Mr. Bennett came from the steel rail of the track, though I do not rule out the possibility it could have come from above. The bolt of lightning being carried by the steel rail could have come from several miles away, north or south. The excluded testimony of Mr. Fulcher has been carefully considered, and, if it were competent in whole, which we do not concede, such testimony considered with all the other evidence would not make out a case for the jury.

If the excluded testimony of Carl Mayes were competent, it would not strengthen plaintiff's case.

In *Metropolitan Railway Company* v. *Jackson*, 3 App. Ca., House of Lords, 193, Law Reports 1877-78, the eminent Lord Chancellor, Lord Cairns said: "It would be a serious inroad on the province of the jury, if, in a case where there are facts from which negligence may reasonably be inferred, the Judge were to withdraw the case

from the jury upon the ground that, in his opinion, negligence ought not to be inferred; and it would, on the other hand, place in the hands of the jurors a power which might be exercised in the most arbitrary manner, if they were at liberty to hold that negligence might be inferred from any state of facts whatever."

Plaintiff's intestate's death was a tragic accident. Hard cases make bad law. It is our duty not to make law, but to administer it. In our opinion the judgment of nonsuit below under the Act as written and the evidence was correct.

Affirmed.

Johnson, J., not sitting.

FILED
APR 30 1957

BRIEF OF RESPONDENT SOUTHERN RAILWAY COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

In The
SUPREME COURT of the UNITED STATES

TERM 1957

No. 901

Mrs. Myrtle Bennett, Administratrix of the Estate of A. C. Bennett, deceased,
Petitioner,

versus

Southern Railway Company, a corporation,
Respondent.

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In The
SUPREME COURT of the UNITED STATES

TERM 1957

Mrs. Myrtle Bennett, Administratrix of the Estate of A. C. Bennett, deceased,
Petitioner,

versus

Southern Railway Company, a corporation,
Respondent.

BRIEF OF RESPONDENT SOUTHERN RAILWAY COMPANY IN OPPOSITION TO PETITION FOR CERTIORARI

STATEMENT OF THE CASE

In this action it is sought to recover damages under the Federal Employers' Liability Act for the death of an employee of respondent who was killed by lightning. The

opinion of the Supreme Court of North Carolina is reported at 245 N.C. 261 and 96 S. E. (2) 31.

Bennett was a brakeman on one of the defendant's trains. On July 8, 1947, this northbound train arrived at Kings Mountain, North Carolina, about noon. While the crew was doing some switching a cloud came up accompanied by rain. The work was temporarily suspended until the storm slackened to some extent. (R. 27, 28, 32, 35, 38, 97 and 104).

When work was suspended each member of the crew selected his own place of refuge and it definitely appears that no damage from lightning because of proximity to the tracks was apprehended. Bennett and Pickard stayed for a time under a car (R. 27), and Pickard got wet. They were on or near the rail. They then went to the engine, but Bennett, for no apparent reason, went from there in the storm over to the cab or caboose, (R. 27). In doing so he had to go near the rails. The conductor Hardin, now deceased, was in the caboose. Another brakeman, Murphree, was in the cab of the engine on an adjoining track.

After the storm slackened somewhat, Bennett and the conductor got off the caboose. The conductor went over to the cab of the engine and told Murphree that they would make a move. Bennett had a fusee in his hand. Instead of going directly towards the cars on the sidetrack as the conductor did, Bennett started south along a path two or three feet from the ends of the crossties on the main line, (R. 99). While he was walking along this path he was

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Note: References (R) are to pages of the mimeographed record in the Supreme Court of North Carolina.

struck by lightning and killed. He fell with his shoulder near the crossties and his feet still in the path, (R. 49, 50). While work was suspended, another train on the main line was blocked by the caboose and cars left by the crew of which Bennett was a part on the main line, (R. 31). It was so blocked for about ten minutes, (R. 105).

The complaint predicated negligence upon the proposition that the defendant failed to furnish plaintiff's intestate a safe place in which to work, in that the defendant, through the conductor, directed plaintiff to go out of the caboose and work in an "unusually severe storm". The evidence was that the storm was severe but not that it was unusual. In the complaint there was no mention of the tracks being elevated, or of telephone poles and wires, factors stressed at the trial.

In December, 1954, after the case had been pending more than six years, the plaintiff secured a continuance (R. 20-21) upon the ground that the plaintiff had one or more expert witnesses whose presence they desired at the trial, or whose deposition they desired to take. Continuance was granted on condition that the attorneys for the plaintiff give to the attorneys for the defendant, within ten days, the name or names of said expert witnesses and the substance of their testimony. An additional 18 months passed before the trial which was held in March, 1956. During that time the plaintiff took no depositions of experts but on the trial produced a college professor, Mr. Fulcher from Davidson College, located 20 miles from the place of trial, who qualified as an expert physicist, but not an expert on lightning (R. 56). He was not among the experts designated in response to the court's order of September, 1954. Counsel for the plaintiff explained that the plaintiff was unable to get the ex-

perts, whose names were furnished, to the trial but made no explanation as to why their depositions were not taken, (R. 54).

At the trial, the plaintiff undertook to offer expert testimony of Prof. Fulcher to the effect that the stroke of lightning which killed the plaintiff's intestate could have travelled along the rails of the railroad track for several miles and jumped off of the track on to the intestate's body. For instance, on page 79 of the record in the Supreme Court of North Carolina, appears the following question and answer in the testimony of plaintiff's witness, Professor Fulcher:

> "Q. Then, in your opinion, could this lightning have come from several miles, either on the rail, either from north or south?
>
> A. Oh, yes, sir."

The plaintiff also offered a statement made by members of the train crew to the claim agent of the railroad company, Exhibit K, (R. 112) containing the statement: "I believe the lightning came out of the air and hit him." This evidence was excluded as substantive evidence because it was a statement made to the claim agent rather than part of the official report, Ex. D (R. 111), but petitioner treats all evidence offered as being pertinent to the present question.

Petitioner's expert physicist, Prof. Fulcher, said:

> "Let me say, sir, first, lightning is a very freakish thing, but, as I said a moment ago, from the evidence that's in your hypothetical question, sir, my conclusion

is, sir, that it came from the rail, yet I would not exclude the possibility that it could have come from above."

At the trial, the plaintiff offered no evidence to the effect that the storm was unusually severe as alleged in the complaint, but only evidence that it was severe and violent.

At the trial, elements not alleged in the complaint, to-wit: elevation of the tracks, above the surrounding territory, and the presence of telephone lines, were brought into evidence and stressed as factors increasing the danger. But there is no attempt, even up to now, on the part of plaintiff, to correlate this contention with the plaintiff's theory that the current came along the tracks possibly for several miles.

The plaintiff undertook to offer evidence that the intestate would have been safer if he had remained in the caboose than he was on the ground alongside the track, but this was without any effort to relate the opinions to the particular construction of the caboose in question, which the expert witness admitted would be material. For instance, on pages 69 and 70 of the record filed in the Supreme Court of North Carolina, this witness stated: "Now, I realize there are times when it does go through it ('it' referring to a shelter in the nature of a box-). In those cases there are some projections, usually of metal, that leads the electricity inside of the shelter and the projection is above the shelter, or it may be to the side. Anything sticking out from a box like shelter will tend to bring the electricity on the inside." There was no attempt by the plaintiff to show whether or not the caboose in question had any projection at the top or from the sides, such as a smoke stack, appearing on many cabooses.

After a temporary stoppage of work, the crew resumed when the rain slackened as shown by Exhibit K appearing on page 112 of the record in the Supreme Court of North Carolina. In quoting excerpts from this exhibit in the petition, the petitioner omits the parts thereof showing that the rain had slackened.

No evidence was offered as to any custom of railroads to suspend work on account of storms of any kind.

ARGUMENT

I.

This Case Presents no Federal Question of Substance Not Heretofore Determined by This Court

The petitioner argues that, because no other case can be found accusing a railroad company of negligence under the Federal Employers Liability Act in case of death by lightning, this court should grant certiorari and decide this case.

It would appear that to present a substantial question not before decided does not consist simply in presenting a new fact situation. Few fact situations involved in a law suit fail to present some new fact.

It could as well be argued that the absence of cases tends to show that the occurrence was not of the kind that the defendant was required to anticipate. Surely the mere fact that a case is so weak that no one else has had the temerity to present it, or that it is so unusual that it has never happened before, is not a valid ground for granting certiorari.

It would seem that where the principles of law necessary

to decision are well established by prior decisions of this court, the mere presentation of a unique or unusual fact situation, which is clearly governed by those principles, does not present a substantial question not before determined by this court.

II.

The Supreme Court of North Carolina Clearly Undertook to Apply the Federal Law in Determining Whether or not Plaintiff's Evidence was Sufficient to Make a Jury Case

Contrary to the argument of the petitioner, it is submitted that it is clear that the Supreme Court of North Carolina understood, and undertook to apply, the test as laid down in the decisions of this court.

Quoting from one of the cases, petitioner states the rule to be:

> "Where the facts are in dispute and the evidence in relation to them is that from which fair minded men may draw different inferences the issue of negligence should go to the jury, as well as the issue of proximate cause."

In deciding this case, the Supreme Court of North Carolina said, 245 N.C., at 270:

> "In our opinion, after considering all the evidence in the light most favorable to plaintiff, and accepting it as true, and giving her the benefit of all reasonable

> inferences to be drawn therefrom, the only reasonable conclusion at which fair minded men could arrive is that the danger, at the time and place, of being struck by lightning, was so remote as to be beyond the requirement of due care and, therefore, the death of plaintiff's intestate was not caused in whole or in part by any negligence on defendant's part."

This is as plain a statement as could be made that the North Carolina court thought that fair minded men could not draw different inferences as to the defendant's negligence and proximate cause, which is the exact test laid down by this court.

In another quotation from this court, the petitioner says that the question is "what a reasonable and prudent man would have done under the circumstances."

The Supreme Court of North Carolina said:

> "The test is whether reasonable men, examining the circumstances then and there, and the likelihood of injury from lightning, would have ordered the train crew and plaintiff's intestate to make a move and pull the loaded cars out."

Thus it appears that the North Carolina court used the proper test of negligence, and the proper yard stick for determining whether or not the evidence justified a finding of negligence.

III.

There is no Question of Divergence of Rulings on Facts Similar to Those Involved in This Case

Under the third heading of her argument, the petitioner advances the view that certiorari should be granted in this case to preserve uniformity of rulings. Since counsel for petitioner admit that they have been unable to find any case presenting a like situation, it is difficult to see upon what they base the argument that there is any divergence of rulings which needs to be settled by this court in this respect.

IV.

The Petitioner's Argument that the Standard of Care Required of Defendant with Respect to a Place to Work Must be Commensurate With the Dangers of the Business does not Support the Granting of Certiorari in This Case

There is no quarrel with the contention that the standard of care must be commensurate with the dangers of the business. Nor did the opinion of the Supreme Court of North Carolina hold differently. The petitioner's claim here is that the defendant should have avoided the alleged danger altogether and should have suspended business because of the danger. The cases which petitioner cites on this point recognize the right of defendant to continue to do business in the face of increased danger, but point out the corresponding duty of the defendant to increase its care for the safety of its employees while doing such business. None of the cases held that the defendant should suspend busi-

ness because of the dangers necessarily incurred in continuing business. No precaution is suggested here that the defendant should have taken when resuming operations.

V.

The Supreme Court of North Carolina Correctly Held that the Danger at the Time and Place, of the Intestate being Struck by Lightning, was so Remote as to Put Beyond the Requirement of Due Care any Duty to Further Suspend Operations

We realize that by its recent decisions this Court has gone very far in permitting cases brought under the Federal Employers' Liability Act to go to the Jury where there is any shred of evidence upon which the jury might find the employer guilty of negligence. *Rogers* vs. *Missouri Pac. R.R. Co.*, 352 U.S. ....., 1 L. ed. (2) 493, 77 Sup. Ct. 443, and *Webb* vs. *Illinois Central R.R. Co.*, 352 U.S. ....., 1 L. Ed. (2) 503, 77 Sup. Ct. 451, both decided February 25, 1927. But even under the doctrine of those cases there is a jury issue only when "with reason, the conclusion may be drawn that negligence of the employer played any part at all in the injury or death." In this case it is abundantly clear that no possible inference can be drawn of employer negligence in contributing to the death of petitioner's intestate from a stroke of lightning. This case clearly is governed by *Herdman* v. *Pennsylvania R. R. Co.*, 352 U.S. .....,1 L. ed. 508, 77 S. Ct. 455, decided on the same day as the cases just cited. A stroke of lightning in the summertime in North Carolina is just as much a usual or ordinary hazard as was the emergency stop of the train in the *Herdman* case.

The petitioner advances two theories and in effect says that the jury ought to be allowed to speculate that plaintiff was killed either by lightning which struck the rail at any place within several miles, or that he was struck by a direct bolt of lightning. The plaintiff further takes the position that the defendant should have anticipated whichever of these occurrences took place.

Plaintiff suggests no precaution that defendant should have taken except the complete suspension of work and keeping the members of the crew in the caboose while the storm was in progress.

If the railroad company is required to anticipate injury to, or death of, an employee in both of the ways suggested by the plaintiff under circumstances such as are here involved, the rule of due care advanced by the plaintiff would require the railroad company to suspend operations whenever an electrical storm was in progress within several miles of the place of work. Obviously the suspension would not be limited to elevated places because of the possibility that lightning would strike the track at an elevated place and travel for several miles on the rails and then injure or kill an employee in a non-elevated place.

As a practical matter, the question we face is whether the possibility of injury from lightning is great enough to require the railroad company, in the exercise of due care, to suspend all operations which would require an employee to be on the ground near the tracks at any place which is within several miles of an electrical storm. The petitioner may say that it would only apply to severe electrical storms; but if the jury is to determine (as in this case, 9 years after the event) what storms are severe enough to require this

suspension of work, the only safe course for the railroad company to follow would be to suspend work whenever an electrical storm was in progress.

After the happening of the event, it is easy for plaintiff to point out that some other place would have been safer. If Bennett had been killed while in the caboose by a stroke of lightning, the plaintiff could easily contend, and doubtless could offer expert testimony to prove, that he would have been safer in the cab of the engine, which was probably entirely enclosed in metal, whereas the caboose was doubtless partly of wood. But the situation which the conductor had to face was the situation prior to the injury. The question was the extent of risk of lightning striking one of the workmen if he went out near the tracks, with no knowledge chargeable to the conductor so far as appears that any person had ever been struck by lightning because of working near the tracks in a similar location. The evidence clearly shows that all the workmen failed to anticipate any such occurrence when they were left to their own devices as to where they would stay during the course of the storm. The same is true of the plaintiff's outside witnesses, one of whom testified that he walked along one of the tracks for several feet immediately preceding the time of making a telephone call as to which he testified that he encountered electrical interference because of the storm, (R. 88).

The plaintiff stresses now the elevation of the track at this particular place and, without the citation of any authority or any writing on the subject, makes the broad statement that any mature person could reasonably be expected to know that elevated places have been struck more frequently than other places at a lower elevation. The comparatively small part that elevation has in determining where

lightning will strike is stated by the Supreme Court of Montana in *Wiggins* vs. *Industrial Board,* 54 Mont. 335 170 Pac. Rep. 9, quoting from a brochure by H. H. Cochrane, referred to by that court as a leading electrical engineer of this country, as follows:

> "If the earth were perfectly flat and uniform, the points at which lightning would strike would be determined entirely by the location of the charged clouds and the characteristics of the atmosphere intervening between the clouds and the earth. In general, the lightning would start from the lowest point on the charged cloud, and would follow the path of least resistance through the atmosphere to the earth. Where the earth is not uniform, due to either variable contour, or the existence of buildings, trees, poles, or other projections from the surface, or due to regions of good conductivity, caused by moisture, as compared with regions of poor conductivity, caused by dry sand or rock, the course of the lightning to the earth will be somewhat modified by these irregularities. This follows from the fact that the lightning always tends to take the path of least resistance.
>
> "In all ordinary cases, however, the location and configuration of the storm clouds, and the more or less variable conductivity of the atmosphere, are by all means the predominating factors in determining where the lightning will strike, and all ordinary, natural, or artificial projections from the earth's surface are of comparatively small importance."

Assuming some small influence of elevation on the frequency of lightning strokes, it does not follow that such

frequency is substantial under any conditions, and it is doubtful that an elevated ridge of no more than 30 or 40 feet elevation would have any effect. It is a matter of common knowledge that on elevated places acres and acres of tall trees have stood for many years and that one may travel many miles among these trees before finding one which has been struck by lightning.

It is submitted that the chance of being struck by lightning where Bennett was working was no more than a bare possibility. As correctly stated by the Supreme Court of North Carolina in this case "bare possibility is not sufficient"; or, as stated by this court, "events too remote to require reasonable pre-vision need not be anticipated." *Brady* vs. *Southern Rwy. Co.*, 320 U.S. 476, 88 L. ed. 239, 64 S. Ct. 41.

It is submitted that the court will look not only to the extent of the possibility of injury which should have been anticipated but also to the burdensomeness of the measures advocated to avoid or off-set the risk. This is necessarily involved in the conduct of reasonably prudent persons. It is again pointed out that in this case the petitioner suggests no measures that the defendant should have taken short of the total suspension of work while the storm was in progress. In this case the suspension of work was delaying the passage of a through freight train which was blocked on the main line. To follow the only remedy suggested by the petitioner would immediately raise the question as to who is to be the judge as to whether there is a storm close enough to suspend operations. Employees are necessarily scattered all over the yards and up and down the lines of a railroad company. In the yards, if the person in charge of the switch tenders considers that a storm is close enough

to quit, then he would be required to cause them to quit, leaving their switches unattended. If the train crew continued on, a very serious accident could result. The plaintiff goes further and says not only should operations be suspended but, in effect, that a shelter should be provided. In many instances a caboose would not be available and the railroad company would have to provide other forms of shelter readily accessible to all employees who might be working along a track within several miles of a storm. Another question would be as to when the danger from lightning is over. There is no necessary connection between the rain and the lightning, and the phenomenon of lightning may not even occur in connection with a thunder storm. See 14 Ency. Britannica (1953) Page 115-G.

It is submitted that the serious disruption to the operation of a railroad which would result from the rule such as advocated by the plaintiff completely outweighs the remote possibility of injury from lightning in a particular situation and especially a situation similar to that to which the deceased Bennett was exposed. For these reasons, it is submitted that the Supreme Court of North Carolina was correct in holding as a matter of law that it was not the duty of the railroad company to anticipate the danger from lightning to such an extent as to continue to suspend operations. To hold otherwise, would require the railroad company to anticipate in advance and prevent an occurrence which the petitioner's able counsel are unable to explain with any degree of certainty in retrospect, as evidenced both by their tendency to advance two separate theories and leave it to the jury to guess which one is the correct one and also their inability to decide on what expert witnesses to use.

In *Roberts* vs. *Alabama Great Southern Co.,* 250 Ala. 629, 35 Sou. (2) 509, there was an accident that occurred on February 12, 1945, when a freight train was struck by a tornado. The entire train, except the engine, tender and some tank cars, was blown from the track and the caboose was demolished. Roberts, a flagman, was riding in the caboose and was killed. His administratrix brought an action under the Federal Employers' Liability Act for the alleged wrongful death of Roberts and it was alleged that the engineer observed the tornado in the distance and failed to stop the train, and if he had stopped the train it would have escaped the tornado.

In the first trial there was a judgment and verdict for the plaintiff in the sum of $50,000.00. On the defendant's motion, a new trial was awarded on the ground that the defendant was entitled to a directed verdict and, on appeal to the Supreme Court, this ruling was affirmed.

On the second trial, the court directed a verdict for the defendant and, upon appeal, this was affirmed by the Supreme Court of Alabama, 253 Ala. 636, 46 Sou. (2) 213, and the Supreme Court of the United States denied certiorari, 340 U. S. 829, 95 L. ed. 609, 71 S.Ct. 66.

Upon the first appeal the ruling of the court is shown in the third and fourth head notes as follows in 35 Sou. (2) 509:

> "Master and servant.—Engineer was not negligent, so as to render railroad liable under Federal Employers' Liability Act for death of flagman, in failing to stop freight train when he saw tornado which was about 100 feet wide, two or three minutes before it struck

train and caused flagman's death, where it was impossible for engineer to predict course in which tornado was to travel. Federal Employers' Liability Act, 45 U. S. C. A., No. 51, et seq.

"Negligence—The fact that after an accident has happened, it can be shown how the accident could have been prevented, is not evidence of negligence."

And in the body of the opinion, it is stated:

"Nor is there anything which tended to show that defendant's engineer and conductor were guilty of negligence in failing to stop the train before encountering the whirlwind. Had they known or had reason to believe it was impending, they had no more reason to believe that it would strike the railroad where it did than at any place along its road where the train might have been stopped. Defendant's servants operating the train might as well be charged with knowledge of where a thunderbolt would strike and be imposed with the duty of avoiding it, as to charge them with knowledge of when and where a whirlwind would arise, and the course it would take . . . If men went about to guard themselves against every risk to themselves or others which might by ingenious conjecture be conceived as possible, human affairs could not be carried on at all."

None of the cases relied upon by the plaintiff tend to support a ruling that a railroad company is required, in order to meet the standard of a reasonably prudent person, to disrupt its business by suspending operations in case of severe electrical storms because of the possibility of a workman near the track being struck by lightning. When peti-

tioner's cases are examined, it will be found that in every case the *foreseeable risk of injury,* without the aid of the retrospective view, was more than a bare possibility and that the duty imposed upon the defendant was not so unreasonably burdensome as to transcend the limits of the practical conduct of reasonable men.

The petitioner relies on the fact that the train crew did suspend work for a time on account of the storm. The Exhibit K offered by the petitioner, page 112 of the record, tends to indicate that this stoppage was because of the rain. Regardless of the particular reason for the stoppage, to substitute the judgment of a jury for that of a train crew as to when work would stop, would place an unreasonable burden upon the operation of a railroad, and one which reasonably prudent persons do not undertake.

If operations are to cease because of the remote risk of lightning during electrical storms, it is just as logical to say that operations should cease during very hot weather because there is risk of sunstroke, that they should cease during extremely cold weather because of the risk of death or injury by freezing, and that they should cease during snow blizzards because of the risks from decreased visibility. The frequency of injury from each of these causes is doubtless greater than from lightning. To cease operations in local situations involving any of these conditions may affect a much wider area because of the interdependence of one railroad operation upon numerous other operations of the same and other lines. So far as we can find no court has yet placed so great a burden on a railroad company because of so remote a risk.

To say that because due care requires a railroad company

to de-energize exposed "hot" wires to prevent injury to a workman required to work near them, or that a railroad company should take reasonable steps to keep its yards free of dangerous conditions such as accumulations of ice or large cinders, or that a railroad company may be required to refrain from sending a workman on top of a box car which is then being exposed to the force of a gale of wind sufficient to blow it off—all simple precautions which ought to be taken to lessen the necessary risks incident to railroad work—is quite different from saying that operations should cease during climatic and weather conditions of a severe, but not unprecedented, nature.

The rule of the reasonably prudent man applies to both types of situation but when properly applied we submit that different results necessarily follow.

CONCLUSION

For the reasons given, it is urged that the Petition for Certiorari should be denied.

Respectfully submitted:

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